commission arbitrations with cumbersome procedural requirements not imposed by Congress. Indeed, Southwestern Bell's appeal here, if successful, would erase years of local competition progress in Missouri on the basis of alleged procedural infirmities that Southwestern Bell does not even attempt to tie to its substantive challenges. This would constitute an enormous burden not just for the PSC, but also for consumers and carriers as well. Accordingly, the Mathews balance dictates the conclusion that Southwestern Bell got from the PSC all the process that it was due.[17]

C. The Procedures Employed by the PSC did not Violate Missouri Law.

Southwestern Bell also argues that the PSC acted unlawfully by failing to apply the "contested case" procedures specified in the Missouri Administrative Procedures Act ("MAPA"). SWB Br. 50-54. That claim is incorrect for at least three reasons.

First, to apply those procedural requirements in arbitrations under the Act would contravene congressional intent. The Telecommunications Act sets forth

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[17] Even if *ex parte* contacts preclude affirmance, for example, the proper remedy would not be to overturn the PSC's decision or the interconnection agreement it approved, as Southwestern Bell advocates, but instead to remand with instructions that the PSC conduct an evidentiary record showing the "'nature and source of all ex parte [contacts].'" HBO, 567 F.2d at 58.

"strict timelines" that "indicate Congress' desire to open up local exchange markets to competition without undue delay" and specifically forecloses state court review of determinations under the Act. AT&T Communications Systems v. Pacific Bell, No. 98-16047, slip op. at 4 (9th Cir. Feb. 14, 2000).[18] As the Ninth Circuit held in AT&T, "[t]his foreclosure -- coupled with the strict time limits on state administrative actions -- strongly militates against incorporation of state administrative proceedings that are necessary prerequisites for judicial review by the state courts." Id. This principle is fatal to Southwestern Bell's claim here because the time-consuming procedures required by MAPA are merely prerequisites for judicial review in the Missouri state courts.

As the district court recognized, two additional factors founded in Missouri law also defeat Southwestern Bell's argument. *First*, the MAPA does not govern proceedings in which the PSC has established its own procedures. JA 1735. *Second*, even if the MAPA applied, the 1996 Act's "*sui generis*" proceedings are not "contested cases" as defined by the MAPA. Id. at 1734.

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[18] This decision is available on the internet at: http://www.ca9.uscourts.gov/web/newopinions.nsf/f606ac175e.

1. The PSC's Procedures Are not Controlled by the Missouri Administrative Procedures Act.

Contrary to Southwestern Bell's assertions, the PSC was not required to follow the MAPA in conducting this arbitration. To the contrary, the PSC's governing statute explicitly provides that "[a]ll hearings before the Commission or a Commissioner shall be governed by the rules to be adopted and prescribed by the Commission." § 386.410(1), R.S.Mo.

Because the PSC had its own procedures before the MAPA was passed, the Missouri Court of Appeals has rejected Southwestern Bell's argument that the MAPA displaced established PSC procedures, finding instead that, in enacting the MAPA, "the legislature [did not] intend[] to engraft upon the review of the Public Service Commission proceedings a further proceeding." State ex rel. Southwestern Bell Tel. Co. v. PSC, 592 S.W.2d 184, 187 (Mo. App. W.D. 1979). The Court reached the same result in State ex rel. Southwestern Bell Telephone Co. v. PSC, 645 S.W.2d 44 (Mo. App. W.D. 1982), where Southwestern Bell cited cases decided under the MAPA to challenge the PSC's use of interrogatories:

> All of those cases were controlled by the provisions of the Administrative Procedures Act. Unlike those cases, the present case is controlled by the special statutory proceedings before the Public Service Commission. One of those special statutes is Section 386.410-1, which provides: "All hearings before the Commission . .

. shall be governed by rules to be adopted and prescribed by the Commission."

> * * * The legislature has recognized the[ ] differences [between PSC and other administrative proceedings] by creating the special and quite detailed statutes mentioned pertaining to proceedings conducted by the Commission. The authority under Section 386.410-1 for the Commission to adopt its own rules of procedure seems to be a rather uncommon grant to an administrative agency * * *.

Id. at 50.

Where, as here, the PSC established procedures to govern a particular proceeding, the MAPA does not modify or supersede them.

2. Even if the Missouri Administrative Procedures Act Were Applicable here, the PSC Arbitration Was not a "Contested Case" within the Meaning of Missouri Law.

Even if the MAPA applied here, the arbitration the PSC conducted was not a "contested case" under Missouri law. The MAPA defines a "contested case" as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined *after a hearing*." § 536.010(2), R.S.Mo. (emphasis added). A substantive statute only requires a "hearing" in the relevant sense if it specifies that an agency decision must be made after a formal hearing involving trial-type procedures.

> The term "hearing" in §536.010, means *a proceeding in which evidence may be presented, and witnesses may be examined and cross-examined.* An administrative decision is considered to be

> "noncontested" if "made without any requirement of an adversarial hearing at which a measure of procedural formality is followed." Procedural formalities in contested cases generally include notice of the issues; oral evidence taken upon oath or affirmation; the calling, examining and cross-examining [of] witnesses, the making of a record; adherence to evidentiary rules; and written decisions including findings of fact and conclusions of law.

Cade v. Department of Social Services, 990 S.W.2d 32, 36-37 (Mo. App. W.D. 1999) (emphasis added; citations omitted).

"Not every case requiring a hearing is a contested case." Id. at 38 (collecting cases); see also, e.g., Strozewski v. City of Springfield, 875 S.W.2d 905, 907 (Mo. banc 1994) (noting the "absence of formality"; "The grievance procedure does not provide for the kind of hearing that qualifies it as a contested case"); Franklin v. St. Louis Board of Educ., 904 S.W.2d 433, 435 (Mo. App. E.D. 1995) (right to "appeal" employment decision to "an impartial arbitrator"; "The instant grievance procedure, while formal in some respects, does not meet all of the formal requirements for a contested case * * *."); State ex rel. Mitchell v. Dalton, 831 S.W.2d 942, 944-45 (Mo. App. E.D. 1992) (parole hearing not a "contested case" because, *inter alia*, "the 'evidence' relied upon by the Board is neither sworn testimony nor testimony tested by cross-examination").

Nothing in the 1996 Act mandates a "hearing" within the meaning of §536.010(2). For example, nothing in the Act requires the PSC to take sworn or oral testimony, or to allow for the cross-examination of witnesses. Rather, 47

U.S.C. § 252(b)(4)(B) requires only a petition, a response, and the submission of "such information as may be necessary for the State commission to reach a decision on unresolved issues." Further, the Act denominates the proceeding an "arbitration". 47 U.S.C. § 252(b). As a general rule, "[a]rbitration proceedings are not constrained by formal rules of procedure or evidence." Hoteles Condado Beach v. Union de Tronquistas, 763 F.2d 34, 38 (1st Cir. 1985); see also, e.g., Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990) (arbitration is "[a] speedy and informal alternative to litigation"; "such proceedings require 'expeditious and summary hearing, with only restricted inquiry into factual issues'"; citations omitted). Because the 1996 Act does not contemplate a formal hearing, the PSC was not required to follow the MAPA's "contested case" procedures even if the MAPA were applicable here.

State ex rel. Yarber v. McHenry, 915 S.W.2d 325 (Mo. 1995), on which Southwestern Bell relies, SWB Br. 50, is not to the contrary. In that case, the court held that the MAPA's "contested case" procedures applied only after first determining that the Due Process Clause required a formal hearing. 915 S.W.2d at 328. That holding is inapposite here because, as demonstrated above, the Due Process Clause does not require state commissions to provide a trial-type hearing when conducting arbitrations under the 1996 Act.

II. Southwestern Bell's Challenges to the PSC's Pricing Determinations Are Meritless.

Southwestern Bell also raises two challenges to the PSC's pricing determinations. SWB Br. 54-59. *First*, Southwestern Bell claims that the PSC violated the 1996 Act by adopting a "forward-looking" rate methodology. SWB Br. 54-56. *Second*, Southwestern Bell claims that the PSC arbitrarily reduced Southwestern Bell's proposed NRCs "to a level below even those contemplated by a super-efficient hypothetical network." SWB Br. 56. Neither of these claims has any merit.

A. The 1996 Act Does not Require Rates Based on Embedded Costs.

Southwestern Bell argues that the PSC violated the 1996 Act by basing its rate determinations on the FCC's "forward-looking" rate methodology, rather than on Southwestern Bell's proposed embedded cost approach. SWB Br. 54-56. This issue has been fully briefed in another case pending before this Court, Iowa Utils. Bd. v. FCC, No. 96-3321, and oral argument was heard in that case on September 17, 1999. As AT&T and others have demonstrated in that case, the FCC's decision to require rates based on forward-looking costs is entitled to deference under Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and easily passes that standard of review. Indeed, the FCC's decision was compelled by the history, text, and purposes of the 1996 Act, and

has since been unanimously confirmed by the decisions of numerous federal courts and state commissions nationwide. Accordingly, the PSC did not violate the law by adhering to the FCC's valid pricing determinations.

In any event, Southwestern Bell's attempt to raise its general pricing claims here constitutes an improper collateral attack on the FCC's pricing regulations. The validity of those regulations can be challenged only by direct appeal to the U.S. Courts of Appeals, not by bringing a complaint in federal district court. See 28 U.S.C. § 2342 (the Hobbs Act); 47 U.S.C. § 402(a); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396-97 (9th Cir. 1996); Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984); Southwestern Bell Tel. Co. v. AT&T Communics., Inc., No. A-97-CA-132-SS, 1998 WL 657717, at *2 (W.D. Tex. Aug. 31, 1998).

B. The PSC Did not Arbitrarily Reduce Southwestern Bell's Proposed Nonrecurring Charges.

Southwestern Bell argues that the PSC "arbitrarily reduced" Southwestern Bell's proposed nonrecurring charges ("NRCs") by 50 percent. SWB Br. 56. Specifically, Southwestern Bell argues that the PSC "simply pick[ed] the midpoint between Southwestern Bell's and AT&T's proposals," SWB Br. 58, and reduced Southwestern Bell's proposed NRCs to artificially promote competition. Id. at 59. Contrary to Southwestern Bell's representations, the PSC did not

simply make an arbitrary or outcome-driven decision to "split the difference" between Southwestern Bell's and AT&T's competing proposals. Instead, as the District Court properly found, "the PSC based its decision to reduce SWBT's NRCs on flaws in the data from which SWBT compiled its estimates of its NRCs." JA 1717.

The District Court's determination is well-supported by the record, which shows that the PSC set rates "in light of the extensive review and analysis [conducted] by the Commission's Advisory Staff." JA 520.[19] And, with respect to NRCs, the Staff Report provides a lengthy and detailed explanation of Staff's recommendation to reduce Southwestern Bell's proposed NRCs. *First*, Staff found that Southwestern Bell's estimates of labor time were based solely upon estimates provided by its employees, and were not supported by time and motion studies. JA 663. *Second*, Staff determined that a portion of the labor costs included in Southwestern Bell's proposed NRCs were double-counted because they also were reflected in Southwestern Bell's labor factors. Id. *Third*, Staff found these errors significant, because "the labor estimate is the primary input into the NRCs." JA 663.

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[19] Southwestern Bell's claim that "the PSC provided no rationale for its decision," SWB Br. 57, ignores the PSC's express adoption of the analysis contained in the lengthy Staff Report attached to its Order.

In light of the flaws in Southwestern Bell's data, the Staff concluded that it "cannot recommend that the Commission accept the NRCs proposed by SWBT." JA 665. The Staff believed, however, that there would be *some* additional nonrecurring costs associated with unbundled network elements, and thus did not adopt AT&T's proposal to eliminate NRCs altogether. Id.[20] Due to the lack of probative alternative data, the Staff recommended that certain NRCs be established at one-half the rates Southwestern Bell proposed. Id. That figure was consistent with Staff's recommendation, when it did have adequate data, to reduce certain specific NRCs by more than 75 percent. JA 664-65 (reducing Southwestern Bell's proposed NRCs for both service orders and customer conversions). Thus, far from adopting a random compromise, the PSC reasonably adopted the Staff's conclusions, which were based on a conscientious effort to determine accurate NRCs on the basis of the best evidence available in the record.

Furthermore, the Staff was forced to estimate an appropriate reduction in NRCs only because Southwestern Bell failed to come forward with competent data to support its proposals. Binding FCC rules hold that because "incumbent

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[20] The Staff Report's explicit rejection of AT&T's position belies Southwestern Bell's claim that the PSC "unquestionably relied" on undisclosed argument from AT&T in setting rates. SWB Br. 57.

LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network," "incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover." Local Competition Order ¶ 680. Southwestern Bell, however, failed to meet its burden. The PSC properly rejected Southwestern Bell's inflated NRC rate proposals, and reduced them to more appropriate levels according to the best evidence available in the record. The 1996 Act expressly allows a state commission to do this:

> If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

47 U.S.C. § 252(b)(4)(B); see also GTE South, Inc. v. Morrison, 199 F.3d 733, 748 (4th Cir. 1999) (upholding state commission that, "[i]n the face of conflicting evidence and a statutory deadline for decision, * * * relied on the best information available," and finding that "[t]he Act does not command [a state commission] to independently acquire evidence that [an ILEC] did not provide").

Nor did the PSC set NRCs at an artificially low level solely to encourage competition. SWB Br. 59. To the contrary, Staff simply noted that, because NRCs "can be a significant barrier to entry to competitive companies entering the market," the "accuracy [of the NRCs] is of upmost [sic] importance." JA 663;

see also id. at 663-64 ("Staff is not suggesting the cost of NRCs be set solely based upon the incentives they create. Staff does believe that is an important consideration when considering the validity of the information presented by each party and affect these charges will have on the development of competition."). In other words, and as the District Court correctly found, "the PSC relied on the effect of NRCs on competition primarily to analyze the credibility of the estimates provided by both parties," JA 1717, not to actually set the NRCs themselves.

III. The District Court Properly Refused to Relieve Southwestern Bell of its Voluntary Agreement to Provide AT&T with Network Elements in Combination.

There is no dispute that Southwestern Bell must provide AT&T with *existing* combinations of network elements -- *i.e.*, groups of network elements that Southwestern Bell currently combines in its own network. Rule 315(b), 47 C.F.R. § 51.315(b), expressly states that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule was reinstated by the Supreme Court, AT&T Corp., 119 S. Ct. at 737-38, and thus is controlling and dispositive here. US WEST Communics., Inc. v. Hix, 1999 WL 528518, *4 (D. Colo. 1999); see also Rivers v. Roadway Exp.,

Inc., 511 U.S. 298, 312-13 (1994); National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

The only dispute here is whether Southwestern Bell must abide by the terms of the Interconnection Agreement requiring it to combine network elements not already combined in its network. SWB Br. 60. In the Interconnection Agreement it signed on October 9, 1997, Southwestern Bell agreed that, when AT&T requests network elements in combination, Southwestern Bell will connect elements that are not already combined. JA 945-46. Southwestern Bell now argues that it signed the agreement only under compulsion, "as ordered by the PSC," SWB Br. 61, and that it should be permitted to belatedly challenge the Agreement based on this Court's ruling in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. July 18, 1997), that nothing in the Telecommunications Act *requires* ILECs to combine network elements for new entrants.

The PSC rejected Southwestern Bell's belated attempt to avoid its contractual obligation to combine network elements:

> The Commission finds that SWBT is bound by its contractual language because the Eighth Circuit's recent ruling in *Iowa Utilities Board* has not made SWBT's and AT&T's Contract provisions illegal. The decision simply vacated FCC rules which required that ILECs combine elements; it did not prevent ILECs from volunteering to combine such elements.

JA 1391. The District Court held that the PSC's finding that Southwestern Bell had voluntarily agreed to provide network elements in combination "was neither arbitrary nor capricious," and refused to disturb it. JA 1738.[21]

The conclusion that Southwestern Bell is bound by its voluntary agreement to combine network elements for AT&T is compelled by the 1996 Act, which expressly states that parties may only petition state commissions to arbitrate "open issues," not issues which the parties have resolved through voluntary negotiations. 47 U.S.C. § 252(b)(1). The 1996 Act further provides that "[t]he State Commission shall limit its consideration of any petition * * * to the issues set forth in the petition and the response" — i.e., the "open issues." 47 U.S.C. § 252(b)(4)(A); see also SWB Br. 7 (the Act "prohibit[s] [state commissions] from deciding issues that the parties have not identified and contested in the petition and response"). The Act's differential treatment of negotiated and arbitrated issues continues in the provisions governing state commission approval of interconnection agreements. Specifically, section 252(e)(2)(A) controls state commission review of *negotiated* provisions, and provides that a state

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[21] Southwestern Bell incorrectly claims the PSC abandoned the "voluntary agreement" argument. SWB Br. 60. At oral argument in the District Court PSC counsel specifically argued that Southwestern Bell "entered into that agreement [to combine network elements] voluntarily and it was entered into after the date that the law was vacated and Southwestern Bell, knowing that, still entered into the agreement." JA 1672.

commission can reject such a provision only if it "discriminates against a telecommunications carrier not a party to the agreement" or "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A).

By contrast, section 252(e)(2)(B) subjects *arbitrated* provisions to a much more stringent standard: a state commission may reject an arbitrated provision if it "does not meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section [*i.e.*, the pricing standards of section 252]." 47 U.S.C. § 252(e)(2)(B). Section 252(e)(6) then charges district courts with the task of determining whether the state commission has complied with these statutory provisions. 47 U.S.C. § 252(e)(6). The result of this statutory scheme is that only *arbitrated* provisions may be challenged in federal court on the grounds that they do not comply with the substantive provisions of the Act and the FCC's implementing rules.

Here, it is undisputed that Southwestern Bell never identified the "new" combinations issue as a contested issue prior to the submission of the signed Interconnection Agreement, and the issue was never arbitrated before the PSC. SWB Br. 12 ("Southwestern Bell did not identify the provision of network elements in combination as a disputed issue for the PSC"); id. at 64.

Southwestern Bell argues that it would have been futile for it to have asked the PSC to find that it had no obligation to combine elements for AT&T, since "the FCC's combination rules were in full force until long after Southwestern Bell filed its response to AT&T's petition for arbitration." SWB Br. 64. But during that same period Southwestern Bell was actively challenging the FCC's combinations rules in this Court. Southwestern Bell knew what provisions of the Local Competition Order it was challenging; it should have preserved below any claims dependent on those challenges. Because Southwestern Bell "clearly had ample tools available" to anticipate this Court's Iowa Utilities Board decision, it waived any argument dependent on that decision by failing to make a timely objection before the PSC.[22]

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[22] Austin-Westshore Construc. Co. v. Federated Dept. Stores, Inc., 934 F.2d 1217, 1222 (11th Cir. 1991) (party should have preserved objection vindicated by later state supreme court decision based on split in intermediate appellate court authority); see also, e.g., NLRB v. Wizard Method, Inc., 897 F.2d 1233, 1236 (2d Cir. 1990) (party waived argument in agency litigation by failing to make objection contrary to then-binding NLRB precedent); Del Rio Distrib., Inc. v. Adolph Coors Co., 589 F.2d 176, 179 (5th Cir. 1979) (based on grant of certiorari during trial, party should have anticipated Supreme Court's overruling of earlier decision). In a related context, a state habeas petitioner does not have "cause" for failing to raise a then-unestablished constitutional argument in the state courts, if other parties in other litigation are doing so. See, e.g., Engle v. Isaac, 456 U.S. 107, 134 (1982); Jones v. Butler, 864 F.2d 348, 364 (5th Cir. 1988).

Indeed, far from objecting to the Agreement's "new" combinations provision, Southwestern Bell made a tactical, voluntary decision to *agree* to that provision. Specifically, Southwestern Bell agreed to combine network elements itself because it did not want to provide new entrants with access to its facilities. See generally, Mo. PSC Case No. TO-97-40, Tr. 1231 (Commissioner's Examination of Southwestern Bell Witness Deere, and surrounding discussion) (Oct. 16, 1996). Southwestern Bell never proposed, and the parties never discussed, any means of providing new entrants with *direct* access to Southwestern Bell's facilities for the purpose of combining network elements. The PSC's factual finding that Southwestern Bell voluntarily agreed to provide elements in combination, and its conclusion that nothing in the Act or Iowa Utilities Board renders such a voluntary agreement unlawful, are consistent with the findings of numerous District Courts and State commissions across the country.[23]

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[23] See MCI Telecomms. Corp. v. Illinois Bell Tel. Co., No. 97 C 2225, 1999 U.S. Dist. LEXIS 11418, at *14 (N.D. Ill. June 22, 1999) (rejecting ILEC's argument that the Supreme Court's vacation of Rule 319 released it from its agreed-to obligation to provide combinations of network elements); MCI Telecomm. Corp. v. GTE Northwest, Inc., 41 F. Supp.2d 1157, 1190 (D. Or. 1999) (same); US WEST Communics., Inc. v. Garvey, No. Civ. 97-913 ADM/AJB, slip op. at 20-21 (D. Minn. Mar. 31, 1999) (same); Southwestern Bell Tel. Co. v. AT&T Communs., Inc., No. A 98-CA-197 SS, slip op. at 4-6 (W.D. Tex. Nov. 6, 1998) (state commissions have "the authority to determine when a party has a made a

Southwestern Bell's argument that it was compelled by the FCC's rules to agree to combine elements overlooks the fact that the PSC's Final Arbitration Order was issued on July 31, 1997, JA 517, two weeks *after* this Court vacated the FCC combinations rules on July 18. And, despite the fact that Southwestern Bell filed an application for rehearing of the PSC's order on August 20, 1997, JA 733 [illegible] an application that repeatedly relied on this Court's Iowa Utilities Board decision, see JA 738 n.2, JA 741 n.6, JA 782 -- Southwestern Bell raised no objection to the challenged combinations provisions at that time. In fact, Southwestern Bell's Application for PSC Rehearing cited the very provisions of Iowa Utilities Board holding that ILECs have no obligation to combine network elements. JA 768. However, Southwestern Bell did not cite those provisions to argue that it should not be required to combine network elements for new entrants, but only that it should be *adequately compensated* for doing so. JA 767-68. Thus, despite the fact that Southwestern Bell was well aware of this Court's holding freeing incumbent LECs from any legal obligation to make new

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deal during the arbitration and to enforce that deal"); In re: Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation, Case No. 96-922-TP-UNC, Second Entry On Rehearing at 3 (Ohio PUC Nov. 6, 1997) (ILEC's arms-length contractual commitment to combine elements for a new entrant is enforceable, notwithstanding Iowa Utilities Board).

combinations of network elements on August 20, 1997, Southwestern Bell made the strategic decision not to object to its contractual obligation to do so.

Southwestern Bell's argument also ignores that Southwestern Bell signed the Agreement on October 9, 1997, nearly *three months* after this Court vacated the FCC combinations rules. Yet Southwestern Bell again raised no objection to the Agreement's combinations provisions.

Thus, on at least two separate occasions, Southwestern Bell failed to provide the PSC a meaningful opportunity to consider the "new" combinations issue before the signed Agreement was submitted for PSC approval. The Supreme Court has "recognized, in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952).

Furthermore, this Court's decision invalidated FCC Rule 315(c), 47 C.F.R. § 51.315(c), which required ILECs to combine network elements not already combined in their networks, on the grounds that the rule was inconsistent with the plain meaning of section 251(c)(3). Iowa Utils. Bd., 120 F.3d at 813. But the Supreme Court expressly rejected this Court's interpretation of that

provision. Whereas this Court believed that section 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," id., the Supreme Court disagreed, holding that section 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in [separated] fashion and never in combined form." AT&T Corp., 119 S. Ct. at 737. Instead, "[t]he reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated." Id. Thus, "[i]t is well within the bounds of the reasonable" for the PSC "to opt in favor of ensuring against an anticompetitive practice" by requiring Southwestern Bell to combine network elements. Id. at 738. As the Ninth Circuit recently held on this exact issue, it "necessarily follows from [AT&T Corp.] that requiring [an incumbent LEC] to combine unbundled network elements is not inconsistent with the Act * * * because the Act does not say or imply that network elements may only be leased in discrete parts." MFS Intelenet, 193 F.3d at 1121. Thus, this Court should affirm the provisions of the Agreement requiring Southwestern Bell to provide new combinations of network elements.[24]

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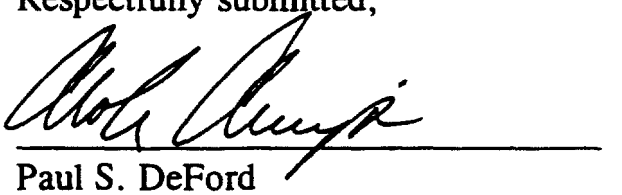
[24] At the very least, this Court should defer ruling on this issue until this Court renders its decision on remand in Iowa Utilities Board. In that case, AT&T and others have asked this Court to revisit its invalidation of Rule 315(c) in light of AT&T Corp. If this Court reinstates FCC Rule 315(c), that rule will require rejection of Southwestern Bell's challenge, whether or not Southwestern Bell "volunteered" to combine network elements for AT&T.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,



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CERTIFICATE REQUIRED BY FED. R. APP. P. 32(a)(7)(C) AND LOCAL RULE 28A(c) AND (d)

This brief was prepared using WordPerfect 8.0. The font is CG Times, proportional spacing, 14-point type.

I hereby certify that this Brief for Defendant-Appellee AT&T Communications of the Southwest, Inc. complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the calculation made by the WordPerfect software, the number of words contained in this brief is 13,830, excluding those portions of the brief listed in Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the diskettes filed with the Court and served on counsel for Appellants and the other Defendants-Appellees were scanned for virus, and found to be virus free.

Alok Ahuja

CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2000, two copies of the foregoing Brief for Defendant-Appellee AT&T Communications of the Southwest, Inc., and a copy of the brief on diskette, were served on the following by first-class mail, postage prepaid:

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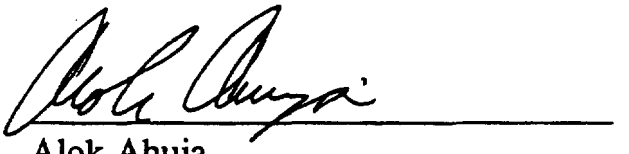
I further certify that, on February 14, 2000, the original and ten copies of this brief, as well as a copy of the brief on diskette, were filed with the United States Court of Appeals for the Eighth Circuit by sending the same to Michael J. Gans, Clerk, United States Court of Appeals for the Eighth Circuit, U.S. Courthouse, 1114 Market Street, St. Louis, Missouri 63101, by Federal Express, Priority Overnight Delivery.



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